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No. 87-391

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHASER SHIPPING CORPORATION and DEN NORSKE KRIGSFORSIKRING FOR SKIB, GJENSIDIG FORENING (THE NORWEGIAN WAR RISK INSURANCE FOR SHIPS, A MUTUAL ASSOCIATION),

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF TO GOVERNMENT'S BRIEF IN OPPOSITION

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E. Gordon, "American Courts, International Law and 'Political Questions' Which Touch Foreign Relations," 14 Int'l Law. 297 (Spring 1980) 8

J. Lobel, "The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law," 71 Va. L. Rev. 1071 (Oct. 1985) 6-7, 8, 9

ARGUMENT

The Brief of the United States, at p. 5, correctly states "the theory of petitioners' claim . . . is that the United States had a duty to warn third party vessels of the presence of the mines" and recognizes (p. 4) that petitioners do not challenge the policy decision of the President or the CIA to mine Nicaraguan harbors. By these statements, the United States in effect concedes, despite its phrasing of the "question presented" (p. I), that this case does not involve a political question and that the courts below erred in so holding.

Failure to warn has nothing whatsoever to do with the alleged purpose of the mining: to interdict vessels carrying munitions or other cargo of use to the Nicaraguan Government from entering or leaving Nicaraguan waters. As a matter

of fact, the opposite would have been true: if the United States had issued warnings of mines without actually having laid any mines at all, the vessel traffic to and from Nicaragua would have been effectively stopped without damaging any vessel or risking loss of life. Thus, Petitioners are complaining of the failure of those agents of the Government charged with executing the policy decision to do so properly by issuing warnings, as required by international law, see "Military and Paramilitary Activities in and against Nicaragua" (Nicar. v. U. S.), 1986 I.C.J. 14, 147-148, para. 292(8) (Judgment of June 27, 1986), also reprinted in 25 I.L.M. 1023 (Sept. 1986), and U. S. precedents, see Petition for Writ of Certiorari at 9-13. This conduct clearly is separate and distinct from the policy itself.

That the Court of Appeals erred grievously in failing to make that distinction is now evident with the publication of the Report of the Congressional Committees Investigating the Iran-Contra Affair, pub. Nov. 13, 1987, Union Calendar No. 277, 100th Congress, 1st Session, H. Rep. No. 100-433, S. Rep. No. 100-216, cited at pages 4 and 5 of the Brief Amicus Curiae of the Norwegian American Chamber of Commerce. The Committees state, at p. 36 of the Report, that the mines were placed at Corinto on a date four weeks before the IVER CHASER was damaged by them. As noted by the Norwegian American Chamber of Commerce in its brief (p. 5), "there would have been plenty of time in which to issue warnings, and if such had been done, the IVER CHASER would not have been damaged."

The United States in its Brief in Opposition appears to argue (p. 5) that even if the United States had issued warn-

ings, such would not have been heeded, inasmuch as the vessel went into Corinto despite mine damage suffered by other vessels in Nicaragua, and an alleged radio warning broadcast by the insurgents. But at the time the IVER CHASER entered Nicaraguan waters, the ship's officers and crew obviously did not know of the existence of the mining; the United States, whose agents failed to issue warnings, cannot be heard to impose an obligation on the vessel to obtain information which was readily available yet not disseminated by the United States and its agents as had been done on previous occasions, and as required under international law. If the United States had issued such warnings, and if the IVER CHASER had ignored them, the situation would have been different. But that is not this case, as Petitioners' pleadings allege, and as Petitioners are prepared to prove.

The United States further appears to argue (Brief, p. 6) that because the crew of the vessel, after loading molasses, was aware of the possible presence of mines, they should not have sailed. Does the United States seriously contend that the vessel should have remained at her loading berth in Corinto until assured by the United States that the mines it had caused to be placed there had been removed?

On p. 3 of its Brief, the Government applauds the concern of the district court as to the "potentiality of embarrassment from multifarious pronouncements by various departments on one question" in this case. That conclusion, however, was reached long before the many pronouncements and revelations made prior to and during the Congressional Iran-Contra hearings. We doubt that District Court Judge Tenney would draw a similar conclusion today!

As for the other criteria discussed in Baker v. Carr, 369 U.S. 186, 217 (1962), in which this Court held that a political question did not there exist, these were all discussed at length at pp. 17-40 of the Petition herein.

In footnote 7 at p. 11 of its Brief, the Government states that Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2d Cir.), petitions for rehearing denied, Nos. 86-7602, 86-7603 (Nov. 18, 1987), involved a suit in the federal court system against a foreign government, apparently arguing that this makes a difference. While that may have been true in some instances in the past, it should not make a difference today. As stated by Prof. Jules Lobel of the University of Pittsburgh School of Law, in his article, "The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law," 71 Va. L. Rev.

1071, 1073-74 (1985), "[S]ubjecting violations of international law by foreign governments to federal court review makes it more difficult to justify shielding similar violations by our own government from judicial scrutiny."

Prof. Lobel also urges that the time has come for "reconsideration of the doctrine permitting the President and Congress to supersede treaties or customary international law. This article contends that the executive and the legislature do not have absolute discretion to violate norms of international law in the conduct of foreign policy." Id. at 1075 (footnotes omitted). Petitioners herein are not contesting the President's policy decision to mine Nicaraguan waters, but they do contend that even if presidential policy decisions in the international sphere may be exempt from examination by the courts, that should not pertain to faulty execution

of such policy decisions by governmental agents.

Even if the United States were correct in arguing that this in effect is a public policy issue masquerading as a tort case - which petitioners emphatically deny - this case nevertheless should be reviewed, lest the political question doctrine be transformed into a unilateral exemption from judicial scrutiny of all governmental actions. See Lobel, supra, at 1157: "Blanket deference to executive or congressional actions will signal to the political branches, the public, and future courts that the political branches are subject to no legal restrictions." See also, E. Gordon, "American Courts, International Law and 'Political Questions' Which Touch Foreign Relations," 14 Int'l Law. 297, 329 (1980). Petitioners respectfully submit that granting this Petition would deliver the message, to paraphrase

Lobel, supra, at 1179, that if Iran or Chile (or Argentina) has no discretion to commit acts in violation of international law, neither do the agents or employees of the executive branch of the United States Government.

CONCLUSION

For the above reasons, in addition to those set forth in the Petition herein dated September 4, 1987, the Supplemental Brief calling the Court's attention to Amerada Hess Shipping Corp. v. Argentine Republic, and the Briefs Amici of the Center for Constitutional Rights and the Norwegian American Chamber of Commerce, the Petition for a Writ of Certiorari herein should be granted.

Dated: New York, New York
December 17, 1987

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